

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD**

In re Application of: Vivian A. Schramm et al.	§	Group Art Unit: 1761
	§	
Serial No.: 09/707,156	§	Examiner: Kelly Jo Bekker
	§	
Filed: November 06, 2000	§	Docket: MRS-015U
	§	
For: Spill-Proof Candy Container	§	Conf No.: 8663

REPLY BRIEF

Commissioner of Patents
Alexandria, VA 22313-1450

This correspondence is being electronically transmitted to the patent office via an EFS-Web transmission on Jan 2, 2013.

Dear Sir:

Pursuant to 37 CFR § 41.41, appellant submits this Reply Brief to the Patent Trial and Board in response to the Examiner's Answer mailed November 2, 2012.

(2) Response to Argument: Priority

The examiner urges that Schramm '046 is prior art to appellant's claims because appellant's claims are drawn to subject matter that includes elements not found in Schramm '046 (see Examiner's answer, item 2, pages 2 and 3). Appellants respectfully disagree with the examiner.

Although appellants acknowledge that appellant's application includes subject matter not disclosed in Schramm '046, appellant's application also includes/discloses everything that was disclosed in disclosed in Schramm '046 (or stated differently, the instant application is a continuation-in-part of Schramm '046). Thus appellants respectfully urge that inasmuch as the instant application discloses and teaches everything disclosed and taught by Schramm '046 and claims priority to Schramm '046, citing Schramm '046 as prior art against any of the claims of the instant application is inherently improper.

(2) Response to Argument: Nonanalogous Art

The examiner urges that appellant's argument that the cited art is nonanalogous is not convincing, and that "*Applicant should submit an argument under the heading "Remarks" pointing out disagreements with the examiner's contentions*" (see Examiner's answer, item 2, page 3). In response to the examiner's urging, appellants provide the argument below.

Appellants respectfully argue that a teaching of In Re Klein was that if prior art is not in the field of applicant's endeavor (FOE) (especially as identified in the claim preamble statement of intended use (SOIU)) and not pertinent to applicant's problem to be solved (PTBS) (again, especially as identified in the claim preamble SOIU), then such prior art is not analogous art. Appellants respectfully argue that such is the case with the instant application – none of the cited prior art is in the appellant's FOE and none of the cited prior art is pertinent to appellant's PTBS.

As defined in the preamble of each of appellant's claims, appellant's FOE and PTBS is (*A container for use in coating a lollipop with a candy powder while preventing spillage of said candy powder*) (see the SOIU of any independent claim preamble of the instant application). In contrast, Product Alert (3/23/98) teaches a conventional (spillable) candy powder container and lollipop combination, Product Alert (8/9/99, part 1) teaches a conventional (spillable) candy powder container and lollipop combination, Product Alert (8/9/99, part 2) teaches a conventional (spillable) candy powder container and lollipop combination, Candy Warehouse (3/27/03) teaches a conventional (spillable) candy powder container and lollipop combination, the references labeled exhibits A,B,D,F and G teach conventional (spillable) candy powder or candy gel/paste containers and lollipop

combinations, Coleman ('884) teaches a conventional (spillable) candy powder container and lollipop combination, Hoeting et al ('870) teaches a conventional (spillable) candy powder/candy bead container and lollipop combination, Applicant's admission of the prior art teaches containers of liquid having inwardly extending funnels, Price (3,840,678) teaches a container of liquid having an inwardly extending funnel, Hunter (GB '356) teaches a container of liquid having an inwardly extending funnel, Williams ('174) teaches a container of foodstuffs having an inwardly extending funnel through which a hand accesses the foodstuffs, Ciffo (2,917,766) teaches a container of liquid having an inwardly extending funnel, Schramm ('046) teaches a container of liquid bubble solution having an inwardly extending funnel, Martindale ('797) teaches a container of light powder having an inwardly extending funnel, Kennedy ('390) teaches a container of liquid having an inwardly extending funnel, Beutlich et al (GB '581) teaches a container of liquid having an inwardly extending funnel, McCombs ('714) teaches a container of liquid having an inwardly extending funnel, Meth ('599) teaches a container of liquid having an inwardly extending funnel, Patterson ('975) teaches a container of liquid having an inwardly extending funnel, Corteggiani et al (FR '917) teaches a container of liquid having an inwardly extending funnel, Pilot Ink (JP '388) teaches a container of liquid having an inwardly extending funnel, McCaffery ('164) teaches a container of liquid having an inwardly extending funnel, Vogelsan (4,522,523) teaches a container of liquid having an inwardly extending funnel, and Manzone (6,159,492) teaches a conventional (spillable and without a funnel) storage container and a medicated lollipop mounted to a container lid – but – none of the prior art teach *"A container for use in coating a lollipop with a candy powder while preventing spillage of said candy powder"*. Appellants respectfully remind the examiner that candy powder does not flow like a liquid and that unlike appellant's invention, none of the prior art adapted to perform appellant's function of *"coating a lollipop with a candy powder while preventing spillage of said candy powder"*. Thus appellants urge that by definition, none of the cited art are analogous and therefore are not available in a proper 35 USC § 103 "obviousness" rejection.

(2) Response to Argument: How Claims Avoid References

The examiner urges that appellant's *"must also discuss the references applied against the claims, explaining how the claims avoid the references or distinguish from them"* (see Examiner's answer, item 2, page 3). Appellants respectfully disagree with the examiner. Appellants respectfully urge that appellants have already done this many times over in appellants prior office action responses. Moreover, appellants note that the only rejection applied against appellant's claims is a USC § 103

“obviousness” rejection and as such by definition already define over the cited art (i.e. otherwise the examiner would have imposed a USC § 102 “anticipation” rejection).

(2) Response to Argument: Field of Endeavor and Problem to be Solved

The examiner urges that “*In this case, as stated in the rejection, the prior art cited is in the field of applicant’s endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned*” (see Examiner’s answer, item 2, page 3). Appellants respectfully disagree with the examiner. Appellants urge that the issue of FOE and PTBS is fully and completely addressed above.

(2) Response to Argument: Field of Endeavor and Problem to be Solved – Sample 1

The examiner urges that “*For example, Product Alert (3/23/98) is directed towards a container with a lollipop and candy powder which is in the field of applicant’s endeavor*” (see Examiner’s answer, item 2, pages 3 and 4). Although appellants agree that “*Product Alert (3/23/98) is directed towards a container with a lollipop and candy powder*”, appellants respectfully disagree that a container with a lollipop and candy powder which is in the field of applicant’s endeavor. Appellants respectfully point out that Product Alert (3/23/98) is directed towards a **conventional** container with a lollipop and candy powder, and that Product Alert (3/23/98) is highly spillable. Moreover, Product Alert (3/23/98) is not adapted to perform appellant’s problem to be solved, namely the “*coating a lollipop with a candy powder while preventing spillage of said candy powder*”. Product Alert (3/23/98) for instance does not provide for the free space within the container as does the instant application, which allows for movement of candy powder around the lollipop (i.e. unlike a liquid, candy powder does not lend itself to plunging a lollipop into it). Appellants respectfully urge that to suggest Product Alert (3/23/98) and appellant’s invention are in the same FOE because they all have containers, candy powder, and lollipops, is tantamount to suggesting that horse drawn carriages and automobiles are in the same FOE because they all have a vehicle with four wheels, drivers, and a means for propulsion.

(2) Response to Argument: Field of Endeavor and Problem to be Solved – Sample 2

The examiner urges that “*Price (US 3,840,678) is directed towards the same problem which the appellant was concerned; Price is directed towards using a funnel to prevent the spillage of a fluid material which is precisely appellant’s problem and solution*” (see Examiner’s answer, item 2, page

4). Although appellants agree that “*Price is directed towards using a funnel to prevent the spillage of a fluid material*”, appellants respectfully disagree that such PTBS is the same PTBS as appellant. Appellants respectfully point out that materials exhibiting the property of flow may be subdivided into multiple distinctly different flowable materials and that the so-called fluid materials of Price (US 3,840,678) (i.e. a liquid ketchup) is substantially different in its property of flow than is an “*edible particulate substance*” (i.e. candy powder). Appellants a container is specifically adapted for use in “*coating a lollipop with a candy powder while preventing spillage of said candy powder*” (for instance free space in the container around the lollipop for the movement of the candy powder), whereas Price (US 3,840,678) is not. Appellants respectfully urge that to suggest Price (US 3,840,678) and appellant’s invention are in the same FOE or are directed to the same PTBS because they all have containers, funnels, and lollipops, is tantamount to suggesting that horse drawn carriages and automobiles are in the same FOE and are directed to the same PTBS because they all have a vehicle with four wheels, drivers, and a means for propulsion.

Conclusion

For the reasons above, it is believed that the rejections should be reversed.

DATE: January 2, 2013

Respectfully submitted,

A handwritten signature in cursive script, reading "Michael R. Schramm", positioned above a horizontal line.

Michael R. Schramm
Reg. No. 56,441
Agent for the Appellant
801-710-7793